STATE OF MICHIGAN
IN THE SUPREME COURT

KEITH A. HUBBARD,

Plaintiff-Appellee,

v

NATIONAL RAILROAD PASSENGER CORPORATION, a/k/a Amtrak, a District of Columbia corporation,

Defendant-Appellant.

Supreme Court
Case No. 127240

Court of Appeals
Case No. 246165

Lower Court Case No. 01-115388-NO
Wayne County Circuit Court
(Honorable Gershwin A. Drain)

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PLAINTIFF-APPELLEE'S SUPPLEMENTAL BRIEF RESPONDING TO SUPREME COURT'S ORDER GRANTING ORAL ARGUMENT ON DEFENDANT-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

* * *

Dated: **February 25, 2005**

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I. INTRODUCTION

Defendant-Appellant, National Railroad Passenger Corporation (Amtrak) seeks leave to appeal under MCR 7.302(B) from the Court of Appeals' ruling, which reversed summary disposition in favor of Amtrak on Plaintiff's negligence claim under the *Federal Employer Liability Act*, 45 USC 51, et seq. (FELA), but affirmed the trial court's ruling dismissing Plaintiff's strict liability claim under the *Locomotive Inspection Act*, 49 USC 20701, et seq. (LIA), and remanded the case for trial on the FELA claim.

MCR 7.302(B) provides that leave shall be granted by this Court in cases such as this one "if the issue involves legal principles of major significance to the state's jurisprudence" or "the decision is clearly erroneous and will cause material injustice" or "the decision conflicts with a Supreme Court decision or another decision of the Court of Appeals.

This Court has granted oral argument on whether leave should be granted, or other peremptory action should be taken, under MCR 7.302(G)(1), and has asked the parties to address whether "the Wayne Circuit Court properly dismissed plaintiff's claim under the Federal Employers' Liability Act, 45 USC 51 *et seq*, because plaintiff failed to present the opinion of an expert that the locomotive cab seat was dangerous or defective."

This brief supplements Plaintiff-Appellee's Response to Defendant-Appellant's Application for Leave to Appeal, and as requested by this Court in its Order granting oral argument on the application for leave to appeal, addresses the specific issues of whether expert testimony is required in such cases and whether leave should be granted.

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Plaintiff requests that this Court affirm the Court of Appeals' ruling, which correctly found that additional expert testimony was not required under the particular circumstances of this case, and therefore, decline to grant leave, or take peremptory action.

II. PLAINTIFF'S NEGLIGENCE CLAIM UNDER THE FELA

Plaintiff has brought a simple negligence claim against his employer, Defendant Amtrak, under the FELA. He was injured while exiting the driver's seat his employer had placed for him in the narrow compartment of the cab car he was driving because he feared an imminent collision with a dump truck on the tracks. Although the train he was driving luckily avoided the collision, Plaintiff was still injured when he dove from the cab car seat.

At this juncture, Plaintiff's claim is limited to whether his employer, Defendant Amtrak, was negligent in putting a cab car seat, which locked in position, in the narrow compartment of the cab car of its train, given that he was injured attempting to exit the seat in an emergency situation. In other words, no one is claiming at this point that the seat was defective (or dangerous, for that matter) in terms of its design; it did what it was designed to do – it locked in place and a lever under the chair needed to be utilized to unlock it from its forward-facing position. However, Plaintiff is claiming his employer, Defendant Amtrak, was negligent under the FELA, because they placed him in a dangerous situation when they had him drive the train from a seat wedged into a small compartment of the cab and from which he could not exit safely in an emergency, such as impending collision.

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III. SUMMARY DISPOSITION STANDARD FOR FELA CLAIMS

In the lower courts, the parties disagreed as to the standard to be applied to a summary disposition motion under MCR 2.116(C)(10) in a case brought under the FELA. The Court of Appeals rejected Plaintiff's argument that a reduced standard of negligence applied in such cases, and held, to the contrary, that the standards were reduced only as to causation, not negligence, which is at issue here. Notwithstanding this conclusion, the Court of Appeals held that Plaintiff, based on the evidence it presented in opposition to Defendant Amtrak's summary disposition motion, had established a jury question as to negligence in this case, when the Court of Appeals stated the following in its Opinion:

> . . . . to survive a motion for summary disposition, a plaintiff must first present sufficient evidence from which a reasonable jury could conclude that the employer was negligent, i.e., owed a duty and breached its duty, irrespective of causation.

Thus, Defendant Amtrak's contention that the Court of Appeals erred in finding a jury question (and as a consequence, violated this Court's ruling in *Smith v Globe Life Ins Co*, 460 Mich 446; 597 NW2d (1999)) is just wrong. If anything, the Court of Appeals refused to apply a lower standard of proof because this negligence case was brought under the FELA, as Plaintiff argued below, and nonetheless, the Court still held there was sufficient evidence to create a jury question. Defendant Amtrak now wants to rachet up the standard of proof required in such cases by requiring expert testimony in all such cases – no cases involving simple negligence claims like this one has ever held that such proofs were required simply to get to the jury.

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IV. EXPERT TESTIMONY IS NOT NEEDED OR REQUIRED

MRE 702 provides that "if the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, training or education may testify thereto in the form of an opinion or otherwise . . . . ". In the case at bar, no "scientific, technical or other specialized knowledge" is required to evaluate whether putting a cab car seat that locked in position in a small compartment of the cab was dangerous; a jury is clearly capable of making such a determination based on the testimony from Defendant's own employees, any documentary evidence about whether it needed to be replaced as a possible hazard, and the visual evidence available to them.

The Court of Appeals, in its opinion, evidently reached this same conclusion when it stated the following about Plaintiff's claim and the evidence offered to support it:

> In this case, plaintiff asserts that defendant was negligent in failing to remove seats equipped with a locking mechanism installed in the cramped confines of certain cab cars, which plaintiff contends created an unreasonable risk of harm given the foreseeability of the engineers' need to exit the seat quickly in the case of an emergency. To establish this point, plaintiff presented the testimony of himself and a fellow engineer, Ronald Black, who both stated that the seat was unsafe as employed. Black also testified to numerous complaints that he had received or had become aware of by other engineers employed by defendant regarding their safety concerns about the locking cab car seat. Additionally, plaintiff provided an interoffice memo dated September 11, 1990, from Paul LaClair, plaintiff's supervisor, to Marshall Berryhill, an executive with defendant, which stated:

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> The following item has been brought to my attention as a safety concern of several of the Detroit and Chicago crew base engineers.
>
> On the 9600 series cab cars, the engineers' seat has a locking devise to prevent the seat from swiveling. *This seat should be modified so that it always swivels and cannot be locked in position.*
>
> The concern is should the situation arise that the engineer needs to vacate the cab in a hurry, he must first remember to unlock his seat, which delays his exiting the cab. [Emphasis added.]

Black was copied on this memo and testified that defendant did begin to replace locking seats with non-locking ones.

The simple fact is that if any so-called "expert" were asked to testify in this case, he or she would probably be an engineer familiar with push-pull cab car operations and capable of assessing whether putting the seat in that compartment was negligent, because of the danger it posed for the driver of the locomotive in the event of a likely collision.

Fortunately, both sides have lay witnesses in this case, e.g. locomotive engineers, who have more than sufficient knowledge to assist the trier of fact, if any such assistance is needed, in understanding a push-pull operation such as this one. Both sides have a number of witness listed who are capable of discussing whether Defendant was negligent by putting the driver's seat in the cab where Plaintiff was injured when he tried to exit in the face of an impending collision. Simply put, experts are not needed in such a case, nor are they required simply because this lawsuit is a negligence claim under the FELA.

This lawsuit is a simple negligence claim and nothing more – it should not be turned into a design defect case simply because Defendant Amtrak wants to label it as one.

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Clearly, this is nothing more than a spurious attempt to either have this case dismissed or to further rachet up the costs of bringing a simple negligence claim, by requiring experts where none are needed (and arguably no one would be qualified to testify as an expert). After all, who specializes in whether it is proper to place a certain type of seat, e.g. one that locks in position, in the cab compartment of a locomotive used in a push-pull operation? If anyone does, it would be those persons already named as witnesses in this case, e.g., locomotive engineers, and not some high priced expert, who has studied railroads or trains.

V. LEAVE SHOULD NOT BE GRANTED

In its Application, and again its Reply Brief, Defendant-Appellant Amtrak argues that this Court should grant leave because the Court of Appeals' decision "conflicts" with this Court's previous ruling in *Smith v Globe Life Ins Co,* supra. Under MCR 7.302(B)(5), leave should be granted if such a conflict existed. However, in this case, there simply is no conflict other than the one Defendant Amtrak seeks to manufacture in an attempt to overturn a ruling from the Court of Appeals adverse to its position.

Smith v Globe Life is not a negligence claim, nor is it a FELA claim, or even a LIA claim; it is a case involving breach of contract and consumer protection claims brought by an insured against an insurance company. Defendant contends that the Court of Appeals' ruling in this case somehow conflicts with this Court's opinion in the *Smith* case merely because the *Smith* case clarified the standards to be applied in reviewing a summary disposition motion brought under MCR 2.116(C)(10), and rejected those cases which held that it was enough "for plaintiffs *to promise to offer* factual support" for their claims at trial.

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In its Opinion, the Court of Appeals did not mistakenly rely on those cases overturned by *Smith v Globe Life*, as Defendant seems to suggest in its Application. To the contrary, the Court of Appeals applied the well-established precedents as to what is required for plaintiff to defeat a motion for summary disposition under MCR 2.116(C)(10). In assessing the need for expert evidence to establish a question of fact as to whether Defendant was negligent, the Court of Appeals stated the following:

> Defendant argues, and the trial court agreed, that despite this evidence, expert testimony was needed to establish that the seat was unsafe as designed. We disagree. Although the locking mechanism is a design feature, we do not believe that expert testimony is needed in order to survive a motion for summary disposition. While the seat design itself may have been safe, plaintiff's chief complaint with the seat design was that it was unsafe *as employed* by defendant given the foreseeability of the need to exit the seat quickly in the case of an emergency. Multiple users of the seat complained of the locking feature as being unsafe in this context, and one of defendant's own employees directed that these seats be replaced because of the specific safety concern plaintiff alleges was the cause of his injuries. We find this evidence to be sufficient in order to create a question of fact for the jury as to whether defendant was negligent. Accordingly, we hold that the trial court erred in summarily dismissing plaintiff's FELA claim. [Cites omitted].

Succinctly stated, the Court of Appeals hit the nail on the head; nothing more in the way of evidence is required in a simple negligence claim. Accordingly, leave should not be granted and the Court of Appeals' ruling clearly should not be overturned peremptorily.

In a design defect case, such an argument would probably carry more weight, but this case is not a product liability case, no matter how much Defendant Amtrak may want to characterize it as one in order to raise the bar as to the quantum of evidence needed just

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to get to the case to a jury. In sum, the Court of Appeals, in a *per curiam* opinion, by Judges Neff, Smolenski, and Zahra recognized this point, and this Court should recognize it too, by denying Defendant's Application for Leave to Appeal as being completely unjustified under the somewhat unique circumstances of this particular negligence claim.

RELIEF REQUESTED

For the foregoing reasons, as well as those points made separately in the Reply to Defendant's Application, Plaintiff-Appellee, Keith A. Hubbard, respectfully requests that this Honorable Court deny Defendant-Appellant's request that leave to appeal be granted in this case, and/or simply affirm the Court of Appeals' ruling which properly reversed the trial judge's ruling in favor of Defendant Amtrak and remanded the case to the trial court for a jury determination with regard to the remaining negligence claim under the FELA.

Respectfully submitted:

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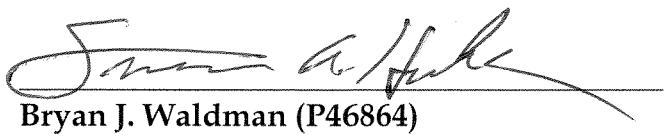

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